In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1205

BEN D. SPIVAK AND DAVID S. SHAPIRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves the liability imposed by Section 6672 of the Internal Revenue Code of 1954 (Pet. App. 21) against the responsible officers of a corporation for failure to pay over taxes withheld from the corporation's employees.

The United States District Court for the Southern District of New York, in a decision affirmed by the United States Court of Appeals for the Second Circuit (Pet. App. 15–20), resolved the issues raised by petitioners in favor of the government. Its principal holdings were that (1) petitioners were responsible persons within the meaning of Section 6672 whose duty it was to collect and pay over the income

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and F.I.C.A. taxes withheld from the wages of the corporation's employees and that they failed to perform such duty, and (2) the government's compromise of the liability of the bankrupt corporation for taxes withheld but not paid over did not release petitioners, as the responsible officers, from their individual liability for the balance of the taxes remaining unpaid (R. 92a).[1] Despite petitioners' claims to the contrary, the decision below presents no conflict among the circuits, and there is no occasion for further review.

1. Petitioners Shapiro and Spivak became president and treasurer, respectively, of Lincoln Industries in June of 1954 (R. 70a). They were authorized to sign checks and they authorized two others to do the same. Both were aware of the financial operations of the business, including the fact that withheld taxes were not being paid over, and either could have authorized payment of the taxes. During the period involved in this litigation, bills were paid for raw materials and labor while withheld taxes remained unpaid. This was done pursuant to the direction of Spivak and with the approval of Shapiro. Spivak worked out a plan with each creditor under which other corporate employees made payments to the creditors. No payments were made except under these plans. After these payments were made, taxes would be paid to the extent that money therefor had been accumulated. On the basis of these facts, the district court found

[1] "R." refers to the appendix to petitioners' brief in the court of appeals.

petitioners to be "responsible persons whose duty it was to collect and pay over the withholding and FICA taxes here involved" and that petitioners "voluntarily, consciously, and intentionally" preferred other creditors of the corporation over the United States (R. 72). Accordingly, the district court held petitioners liable under Section 6672 (R. 86a). Upon review, the court of appeals found the above factors to be "sufficient evidence of wilfulness" (Pet. 18).

The conscious preference of other creditors over the United States, with full knowledge that withheld taxes are owing, constitutes willfulness within the meaning of Section 6672. It is not necessary that there be present an intent to defraud or to deprive the government of taxes, nor is it necessary that bad motives or wicked design be proved to invoke the penalty provisions of that section. *Dillard* v. *Patterson,* 326 F. 2d 302 (C.A. 5); *Frazier* v. *United States,* 304 F. 2d 528 (C.A. 5); *Bloom* v. *United States,* 272 F. 2d 215 (C.A. 9), certiorari denied, 363 U.S. 803; *Cash* v. *Campbell,* 346 F. 2d 670 (C.A. 5); *United States* v. *Strebler,* 313 F. 2d 402 (C.A. 8); *Flan* v. *United States,* 326 F. 2d 356 (C.A. 7).

2. Lincoln was adjudicated bankrupt on July 16, 1956, and the government filed a claim in the bankruptcy proceeding for withholding, F.I.C.A. and F.U.T.A. taxes of $107,135.02, which the court reduced to $84,540.89 (Pet. 16, 17). Subsequently, the trustee of the bankrupt corporation disputed the government's entire claim for taxes on the ground that payments made by the Reconstruction Finance Cor-

poration to the Internal Revenue Service in respect of certain of Lincoln's defense contracts should be credited to Lincoln's tax liabilities and not to the tax liabilities of its parent, Virginia-Lincoln (R. 71a). As a result of the purported misapplication, it was claimed, there was a balance to apply to Lincoln's account of $101,558.70, which would be sufficient to extinguish the entire tax claim against Lincoln (R. 71a).

A compromise was reached between the trustee and the government under which the government agreed to accept a payment from the bankrupt estate of $42,971.26 in full settlement of its claim against the corporation. The settlement agreement in pertinent part provided as follows (R. 70a–71a):

> In consideration of the payments above specified, the United States of America is to assert no further claim for Withholding taxes, FICA taxes, or FUTA taxes, penalties, or interest against the bankrupt or its Trustee herein.
>
> The offer is to be without prejudice to the United States in the assessment and collection of any outstanding assessments for penalties against former officers of said Lincoln Industries, Incorporated, on account of said Withholding and FICA taxes.

Notice of the hearing relating to approval by the bankruptcy court of the government-trustee compromise was given to petitioners, but they did not appear or otherwise object (Pet. 18).

Petitioners urge, however, that the bankruptcy court's approval of the settlement agreement consti-

tuted a final adjudication conclusively precluding the government from collecting the balance of its compromised claim from petitioners.[2] That agreement, however, concerned only the liability of the bankrupt corporation and not that of petitioners.[3] And it is plainly established that the liability of the corporation for taxes withheld and the liability imposed on a responsible officer by Section 6672 are separate and distinct. *Kelly* v. *Lethert,* 362 F. 2d 629 (C.A. 8); *Bloom* v. *United States, supra; Rosenberg* v. *United States,* 327 F. 2d 362 (C.A. 2).

Indeed, there is no requirement that the government even file a proof of claim for the taxes due from the corporate bankrupt before proceeding against and collecting from a responsible officer. See *Cash* v. *Campbell, supra; Newberg* v. *United States,* 187 F. Supp. 158 (S.D. N.Y.), affirmed *per curiam,* 296 F. 2d 152 (C.A. 2). As the corporation and the responsible officers are both principal debtors to the government, the government may settle or compro-

[2] Quite inconsistently, petitioners assert, on the one hand, that the government was bound by the bankruptcy court's approval of the compromise, and that that barred any recovery against petitioners, although they were not parties to the agreement (Pet. 7–8), but, on the other hand, that they were not bound by the agreement, since they were not parties thereto, insofar as the reservation of rights as against them under Section 6672 was concerned (Pet. 9–12).

[3] Whether the government is precluded from asserting a claim against the bankrupt corporation because of the compromise agreement is not here in question; thus, *United States* v. *Coast Wineries,* 131 F. 2d 643 (C.A. 9), relied upon by petitioners (Pet. 7), presents no conflict with the holding in this case.

mise its claim with one of them without in any way affecting the liability of the other for the unpaid balance. Petitioners' reliance (Pet. 12) on *St. Paul Fire & Marine Insurance Co.* v. *United States,* 370 F. 2d 870 (C.A. 5), is misplaced. That case is inapposite to the situation presented here since it involved a suit by the United States against a principal and its surety. Here petitioners are charged not with the liability of another, but rather with their own separate and distinct liability under section 6672. See *Kelly* v. *Lethert, supra.* Finally, it is well settled that a taxpayer who is equally liable with another for the payment of accrued, but unpaid, taxes cannot avoid collection against himself on the ground that the government should first collect from the other party (*Phillips* v. *Commissioner,* 283 U.S. 589; *Cash* v. *Campbell, supra; Kelly* v. *Lethert, supra*), and any claims that petitioners may have against the corporation, whatever they may be, are not involved in this proceeding (*Phillips* v. *Commissioner, supra; Kelly* v. *Lethert, supra*).[4]

[4] Here the government "sought to recover * * * only penalties in the sum of taxes claimed to have been due but never actually received from the employer * * *" (R. 79a). Thus, no question is raised as to whether the government could recover both the 100 percent penalty under Section 6672 and collect the full amount of the tax from the corporation. Various payments, including that received from the bankrupt estate, reduced the amount of unpaid taxes to approximately $27,000, the sum counterclaimed by the government in the instant proceeding (R. 75a). See, however, *United States* v. *Molitor,* 337 F. 2d 917, 924 (C.A. 9).

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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